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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR CAMARILLO CAMPOS,

Defendant and Appellant.

A154324

(Solano County
Super. Ct. No. FCR324025)

Oscar Campos appeals from a judgment after a jury trial. Campos was convicted of two counts of committing lewd acts upon a child under the age of 14 (Pen. Code § 288, subd. (a) (section 288(a))¹ and sentenced to a five-year prison term. His appellate counsel has filed a brief that raises no issue for appeal and asks this court for an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Having conducted that review, we affirm the judgment.

I. BACKGROUND

A. The Charges Against Campos

A 2017 information filed by the Solano County District Attorney charged Campos with two counts of violating section 288(a). In count one, Campos was charged with committing a lewd act against a child on May 8, 2016. Count two charged him with committing a second lewd act on May 28, 2016, and with the special allegation that he

¹ Statutory references are to the Penal Code unless otherwise indicated.

had “substantial sexual conduct” with the child. Campos entered pleas of not guilty and denied the special allegation.

B. Trial Proceedings

During a jury trial held between March 21 and March 23, 2018, Campos was assisted by Spanish interpreters.

1. Jury selection, Opening Statements and Motions in Limine

After a jury was empaneled, the trial court made a record of issues that arose during jury selection. The defense made two challenges for cause, one of which was granted and the other denied. All other challenges for cause were stipulated to by both parties and granted by the court.

The jury received preliminary instructions and heard opening statements from both sides. The prosecutor stated that the evidence would show that Campos committed two separate lewd acts against a 10-year-old boy named G., and that Campos subsequently admitted what he had done to the boy’s mother, Rebecca, who was Campos’s girlfriend at the time. Defense counsel stated the evidence would show the charges against Campos were based on a misinterpretation of accidental touching.

The court ruled on motions in limine outside the presence of the jury. Both sides made standard motions, which were granted without objection. Defense counsel made an additional oral motion to exclude evidence of sexual conduct between Campos and Rebecca, which was granted.

2. Trial Evidence

The People called three witnesses: G., who was twelve by the time of trial; Rebecca; and Vacaville police officer, Andrew Talton. Campos did not present evidence but attempted to establish an accident defense through cross-examination. The witnesses testified to the following facts:

Rebecca met Campos while she was out salsa dancing, he asked her on a date and the relationship became serious, although they never lived together. G. really liked Campos, who became his father figure. Campos also enjoyed spending time with G., so much so that Rebecca grew concerned he would rather spend time with G. than with her.

On May 8, 2016, G. and Campos were alone in G.'s home, while Rebecca was shopping. They started "playing around" in the living room, "wrestling, that kind of thing." G. wore shorts and underwear and may have taken off his shirt while they wrestled. When G. became tired he lied down on the couch. Then Campos put his hand inside G.'s shorts and underwear and rubbed or massaged G.'s bare bottom. G. told Campos to stop, but he did not. Then G. told him again to stop and he did.

A few weeks later, G. was at his home with Campos while Rebecca was at a wedding. They were sitting on the living room couch watching television when Campos touched G.'s "private parts" in his "groin" area. Campos reached his hand inside G.'s pants and underwear, and the skin of his hand touched the skin of G.'s penis for "[m]aybe 30 seconds." Campos moved his hand in some way and asked G. if he liked it. G. said no, and Campos stopped. Campos asked G. if he wanted to do it again, G. said no, and Campos apologized.

About a week later, Rebecca and G. were discussing a book about the ways people express love when G. disclosed that Campos had been massaging him. Rebecca tried to keep the alarm out of her voice and kept the conversation going. Then G. told her about the two incidents. Rebecca probed G. about what happened and eventually contacted the police. G. gave a recorded "Multidisciplinary Interview," which was admitted into evidence at trial.

The police arranged for Rebecca to make a "pretext" call to Campos, and a transcript of that conversation was admitted into evidence. During the call, Rebecca told Campos that G. said Campos had touched his penis. Campos said he was "so sorry" and attempted to explain that he did not do any kind of "wrong thing," but he got caught in a situation that "involved, uh, uh, contact." He said they were just playing when he touched G. but "it wasn't with any kind of intentions." Campos attempted to persuade Rebecca he was not lying and to make her understand that his life could be over because of this situation. Rebecca said that G. told her the touching was intentional. Campos attempted to explain that he did not use any "force with him." Rebecca pressed for an explanation, recounting details that G. had told her. Campos tried to explain them away

with statements like: things happened but not with a bad intention; while they were playing there was a “quick pinch, uh, on the butt”; and “it was impulse.” Campos repeatedly stated he was sorry, and that he loved Rebecca and G.

Under cross-examination, Rebecca and G. both acknowledged that Campos’s first language was Spanish, which they did not speak, but they also opined that his English was pretty good. Rebecca admitted she had a pre-existing fear that somebody would touch G. inappropriately, and had discussed the subject with him many times before the May 2016 incidents. Also, she and G. discussed what Campos had done to G. many times before G. gave his interview.

After the close of evidence, the defense made an oral motion for directed verdicts pursuant to section 1118.1, which the trial court denied.

3. Jury Instructions

The trial court and parties agreed about what jury instructions to give, with three exceptions. First, the defense requested CALCRIM No. 224, regarding the use of circumstantial evidence to establish an element of the case, and CALCRIM No. 225, which addresses the use of circumstantial evidence to prove intent or a mental state. The trial court decided to give CALCRIM No. 225, but not CALCRIM No. 224, because intent was the only element that the prosecutor sought to prove with circumstantial evidence. Second, the court granted a prosecution request to give CALCRIM No. 362, regarding false statements as evidence of consciousness of guilt, despite defense counsel’s assertion that it did not apply. Finally, the court denied a defense request to give an unanimity instruction with respect to the count two allegation of “substantial sexual conduct” with the victim, finding that subject was covered adequately by a special instruction that had been drafted to address the substantial sexual conduct allegation.

4. Closing Arguments

After the court instructed the jury, the parties presented closing arguments. The prosecutor argued Campos violated a position of trust within the family and that the charges were proven beyond a reasonable doubt. He characterized the accident defense as ridiculous and encouraged the jury to return guilty verdicts. Defense counsel argued

the charges were based on the misinterpretation of an accident and the false conclusion of a hyper-vigilant mother living in a closed world she created for herself and her son. Arguing that G. had been equivocal, that Campos struggled to communicate in English, and that Rebecca may have coached G., defense counsel urged the jury to find that any touching was accidental, and that Campos was not guilty of the charges.

The defense made three objections during the prosecutor's closing argument, which the trial court overruled. First, near the beginning of his argument, the prosecutor quipped to the jury that there were "a million instructions," which were drafted by lawyers who got together and decided they did not want anybody else to have their job and just wanted to confuse and bore them. Defense counsel objected this was improper argument. The court overruled the objection and the prosecutor continued, arguing that "in reality" this case was not confusing but very simple. All the jury had to "figure out" and decide was whether this was an accident or was it on purpose, and there was no way this was an accident.

Second, during another part of the prosecutor's closing, he returned to his theme that the case hinged on the question whether the touching was accidental, arguing that in the end Campos would either be found guilty of everything, both counts and the special allegation, or of nothing. Defense counsel objected that the prosecutor misstated the law. The court responded, "Well, it's argument at this point. The law would be that you could find him guilty of one count or another, but he's making an argument. So, overruled."

Finally, during his argument, the prosecutor disputed the defense theory that Campos had been misunderstood because he struggled to communicate in English by arguing that both G. and Rebecca testified that " 'No. He speaks English. He understands pretty well.' " Defense counsel objected that the prosecutor was misstating the testimony. The trial court overruled this objection, but admonished the jury as follows: "Ladies and Gentlemen, what the lawyers say is not evidence. You are the triers of fact. You decide what the evidence is. If either one of them argue something that you think is incorrect, you're the ones who decide what the facts are."

After the prosecutor completed his closing argument, the defense moved for a mistrial, arguing that the prosecutor's remark that lawyers draft jury instructions to be confusing was an invitation for the jury to ignore the law and just follow their gut. The trial court denied this motion, finding that the prosecutor did not encourage the jury to ignore the law and noting that jury instructions often are confusing.

Defense counsel also renewed his objection to the argument that Campos was either guilty of everything or of nothing and requested a "curative" instruction telling the jury that each charge must be decided separately. The court granted this request, but clarified that the instruction was not curative, but should have been included to begin with, and thanked defense counsel for raising the issue.

5. Verdicts

On the morning of March 23, 2018, the court instructed the jury with CALCRIM No. 3515, that "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." Then the court gave pre-deliberation instructions and discussed the verdict form and how to complete it. The jury began deliberating at 11:18 a.m. and returned with verdicts at 2:15 p.m. Campos was found guilty of both counts and the special allegation of substantial sexual conduct was found to be true. At the defense request, the jury was polled to confirm their verdicts were unanimous.

C. Sentence

Having waived time for sentencing, Campos was sentenced by the trial judge on May 7, 2018. Rebecca presented a lengthy victim impact statement. Then the prosecutor requested a midterm sentence of six years for count one and an additional two years for count two, arguing that G. was an especially vulnerable victim because of Campos's relationship with this family. The prosecutor also requested direct restitution to Rebecca in the amount of \$34,900.40. Defense counsel requested that Campos be sentenced to probation because of mitigating circumstances. Alternatively, he requested a lower term sentence for count one and a stayed sentence for count two pursuant to section 654.

Finally, defense counsel requested a restitution hearing, arguing the amount of restitution sought by Rebecca was not supported.

The court found that section 654 did not apply because the convictions were based on separate incidents. It denied the request for probation as inappropriate, and because Campos was ineligible. It sentenced Campos to a three-year lower term for count one and a consecutive two-year term for count two, which represented one-third the mid-term. The court also imposed fines and assessments under section 1202.45, calculated credits, and advised Campos of his appeal rights. The victim restitution matter was continued.

At a May 9, 2018 restitution hearing, the prosecutor argued that Rebecca's lost wages in the amount of \$34,900.40 were recoverable under section 1202.4(f)(3)(D). The defense rejoined that a victim could recover lost wages under these circumstances but not a victim's mother. The court ordered that victim restitution included Rebecca's lost wages resulting from the trauma Campos inflicted on the victim and his mother, and it also ordered Campos to pay an additional fine to the victim compensation board. The court found that Rebecca's request for other costs was not supported but reserved jurisdiction to hear a future claim. Finally, Campos was ordered to register as a sex offender under section 290.

II. DISCUSSION

The *Wende* brief filed by appellant's counsel does not draw our attention to any issues under *Anders v. California* (1967) 386 U.S. 738, 744. Moreover, Campos was appraised of his right to file a supplemental brief and to request to have his counsel relieved, but he did neither. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110 [appellate court must address issues raised personally by appellant in *Wende* proceeding].)

Following *Wende* guidelines, we have conducted an independent review of the record summarized above and conclude there are no meritorious issues to be argued on appeal.

Campos was represented by competent counsel and assisted by interpreters. There were no recorded objections to jury selection and the record shows that the jury received correct instructions. The defense motion for directed verdicts was properly denied

because there was substantial evidence to support convictions on both counts and the special allegation. (§ 1118.1.) Defense objections to the prosecutor’s closing arguments were addressed correctly by the court, eliminating any claim of prejudicial error.

Sentencing issues preserved for review do not have arguable merit. Campos was not eligible for probation. (§ 1203.066(a)(8).) Section 654 does not apply because each charged act was separate and distinct and neither act was necessary to accomplish the other. (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006-1007.) Moreover, Rebecca qualifies as a victim for purposes of restitution (§ 1202.4(k)(3)(A), and her lost wages are recoverable as restitution (§ 1202.4(f)(3)(D)). And, the restitution statute “does not distinguish between economic losses caused by physical injuries and those caused by psychological trauma.” (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075.)

III. DISPOSITION

The judgment is affirmed.

Tucher, J.

We concur:

Streeter, Acting P.J.

Brown, J.